

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DARNELL O McGARY,

Plaintiff,

V.

KELLY CUNNINGHAM, DON GAUNTZ,  
Dr. HOLLY CORYELL, ED YOUNG, Dr.  
BRUCE DUTHIE, JEFF CUTSHAW,  
REGINALD WOODS, and MARK  
LINDQUIST.

## Defendants.

CASE NO. C13-5130 RBL-JRC

ORDER LIFTING STAY, DENYING PLAINTIFF'S MOTION TO FILE A THIRD AMENDED COMPLAINT AND ISSUING A NEW SCHEDULING ORDER

This 42 U.S.C. §1983 civil rights matter has been referred to the undersigned Magistrate

Judge pursuant to 28 U.S.C. §§ 636 (b) (1) (A) and (B) and Local Magistrate Judge Rules MJR

### 1. MJR 3, and MJR 4.

The Court stayed this matter at the request of the parties on December 6, 2013. The

Court entered the stay because of criminal charges filed against plaintiff (Dkt. 86). On March

<sup>28</sup> In 2014 plaintiff filed a motion asking that the Court lift the stay (Dkt. 91). The Clerk's Office

noted plaintiff's motion for April 18, 2014. Defendants represented by the Attorney General's

Office have responded to the motion and do not oppose lifting the stay (Dkt. 81). Defendant

Lindquist did not respond to the motion.

ORDER LIFTING STAY, DENYING PLAINTIFF'S  
MOTION TO FILE A THIRD AMENDED  
COMPLAINT AND ISSUING A NEW  
SCHEDULING ORDER - 1

1 The Court orders that the stay entered in December of 2013 is lifted.

2 Before the noting date for the motion to lift the stay, plaintiff filed two additional  
3 motions. Plaintiff filed a motion to submit a third “supplemental” complaint, (Dkt. 93), and an  
4 “unopposed motion to extend the discovery schedule.” (Dkt. 94). Plaintiff’s unopposed motion  
5 is not signed by either the Attorney General’s Office or Defendant Lindquist’s office, although  
6 plaintiff states that the matter has been discussed with all parties (Dkt. 94, p. 2).

7 1. Amendment of the action.

8 The Court denies plaintiff’s motion to file a supplemental complaint for a number of  
9 reasons. When the Court stays an action the parties may not continue to engage in motion  
10 practice. Thus, plaintiff’s motion was not properly filed because the stay had not been lifted. In  
11 addition, the Western District Local Rules require a plaintiff to submit a proposed amended  
12 complaint and not simply a motion. The Rule states:

13 A party who moves for leave to amend a pleading, or who seeks to amend a  
14 pleading by stipulation and order, must attach a copy of the proposed amended  
15 pleading as an exhibit to the motion or stipulation. The party must indicate on the  
16 proposed amended pleading how it differs from the pleading that it amends by  
17 bracketing or striking through the text to be deleted and underlining or  
18 highlighting the text to be added. The proposed amended pleading must not  
incorporate by reference any part of the preceding pleading, including exhibits. If  
a motion or stipulation for leave to amend is granted, the party whose pleading  
was amended must file and serve the amended pleading on all parties within  
fourteen (14) days of the filing of the order granting leave to amend, unless the  
court orders otherwise.

19 Local Civil Rule 15. Plaintiff’s motion does not conform to the Local Rules. The Court must  
20 have the proposed complaint to consider. Further, under the Local Rule, supplemental  
21 complaints are not normally allowed.

22 A final consideration for this Court is the length of time this action has been pending.

23 Plaintiff commenced this action in February of 2013 and the action is now over one year old.

1 The Court will not allow the action to become a continuum of events that includes events that  
2 occurred after the filing of the original action. The Court denies plaintiff's motion to amend  
3 this action. The operative complaint in this action will remain the amended complaint filed July  
4 24, 2013 (Dkt. 42).

5 2. Scheduling order

6 At the time the Court stayed this action discovery should have been nearly completed.

7 The scheduling order that was in effect at the time of the stay included a January 3, 2014 cutoff  
8 date (Dkt. 55). Because the Court has denied amendment of the complaint the Court does not  
9 believe a lengthy continuation of discovery is needed. The Court amends the scheduling order  
10 as follows:

11 (1) Discovery

12 All discovery shall be completed by **June 20, 2014**. Service of responses to  
13 interrogatories and to requests to produce, and the taking of depositions, shall be completed by  
14 this date. Federal Rule of Civil Procedure 33(a) requires answers or objections to be served  
15 within thirty (30) days after service of the interrogatories. The serving party, therefore, must  
16 serve his/her interrogatories at least thirty (30) days before the deadline in order to allow the  
17 other party time to answer.

18 (2) Dispositive Motions

19 Any dispositive motion shall be filed and served on or before **September 5, 2014**.

20 Pursuant to LCR 7(b), any argument being offered in support of a motion shall be submitted as a  
21 part of the motion itself and not in a separate document. The motion shall include in its caption  
22 (immediately below the title of the motion) a designation of the date the motion is to be noted for  
23 consideration upon the Court's motion calendar. Dispositive motions shall be noted for

1 consideration on a date no earlier than the fourth Friday following filing and service of the  
2 motion. LCR 7(d)(3).

3 All briefs and affidavits in opposition to any motion shall be filed and served pursuant to  
4 the requirements of Rule 7 of the Federal Rules of Civil Procedure and LCR 7. The party  
5 making a motion may file and serve a reply to the opposing party's briefs and affidavits. Any  
6 reply brief shall also be filed and served pursuant to the requirements of Rule 7 of the Federal  
7 Rules of Civil Procedure and LCR 7.

8 Defendants are reminded that they MUST serve *Rand* notices, in a separate document,  
9 concurrently with motions to dismiss and motions for summary judgment so that *pro se* prisoner  
10 plaintiffs will have fair, timely and adequate notice of what is required of them in order to  
11 oppose those motions. *Woods v. Carey*, 684 F.3d 934, 941 (9th Cir. 2012). The Ninth Circuit  
12 has set forth model language for such notices:

13 A motion for summary judgment under Rule 56 of the Federal Rules of  
14 Civil Procedure will, if granted, end your case.

15 Rule 56 tells you what you must do in order to oppose a motion for  
16 summary judgment. Generally, summary judgment must be granted when  
17 there is no genuine issue of material fact – that is, if there is no real  
18 dispute about any fact that would affect the result of your case, the party  
19 who asked for summary judgment is entitled to judgment as a matter of  
20 law, which will end your case. When a party you are suing makes a  
21 motion for summary judgment that is properly supported by declarations  
22 (or other sworn testimony), you cannot simply rely on what your  
complaint says. Instead, you must set out specific facts in declarations,  
depositions, answers to interrogatories, or authenticated documents, as  
provided in Rule 56(e), that contradict the facts shown in the defendant's  
declarations and documents and show that there is a genuine issue of  
material fact for trial. If you do not submit your own evidence in  
opposition, summary judgment, if appropriate, may be entered against  
you. If summary judgment is granted, your case will be dismissed and  
there will be no trial.

1 *Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998). Defendants who fail to file and serve the  
2 required *Rand* notices on plaintiff may have their motion stricken from the Court's calendar with  
3 leave to re-file.

(3) Joint Pretrial Statement

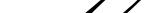
5 The parties are advised that a due date for filing a Joint Pretrial Statement may be  
6 established at a later date pending the outcome of any dispositive motions.

(4) Proof of Service and Sanctions

8 All motions, pretrial statements and other filings shall be accompanied by proof that such  
9 documents have been served upon counsel for the opposing party or upon any party acting *pro  
10 se*. The proof of service shall show the day and manner of service and may be by written  
11 acknowledgment of service, by certificate of a member of the bar of this Court, by affidavit of  
12 the person who served the papers, or by any other proof satisfactory to the Court. Failure to  
13 comply with the provisions of the Order can result in dismissal/default judgment or other  
14 appropriate sanctions.

15 (5) The Clerk of Court is directed to send a copy of this Order to plaintiff and to  
16 counsel for defendants.

Dated this 18<sup>th</sup> day of April, 2014.

  
J. Richard Creature  
United States Magistrate Judge